A condition precedent is a condition which must be performed before a liability arises. *Van Buskirk v. Kuhns* (1913) 164 Cal. 472. This case also affirms the well-established rule that a condition precedent must be averred and proved by the plaintiff. A condition subsequent is a condition which is to be performed subsequent to the creation of the liability. Cf. *Semmes v. Hartford Insurance Co.* (1891) 13 Wall. (U. S.) 158. The burden of proving a condition subsequent is on the defendant. In many cases the courts have apparently mistaken a condition precedent for a condition subsequent. Typical of this class of cases are, *Gray v. Gardner et al.* (1871) 17 Mass. 188; *Moody Insurance Company* (1894) 52 Oh. St. 12; *Williams v. U. S. Mutual Accident Ass'n* (1895) 147 N. Y. 693. In all of these cases the courts placed the burden of proving performance of the condition on the defendant. It may be that in these cases the wording of the contract tended to confuse the courts, and especially in the insurance contracts where the words "but if" are often employed to introduce the condition. In the principal case, however, there are no misleading words in the agreement and it appears clearly that the defendant was to be under no duty to reassign to A unless, and until, the conditions named were performed. The conditions, though obviously subsequent to the formation of the contract, were clearly precedent to a right of action in the plaintiff, and were therefore conditions precedent. As such, the court should have placed the burden of pleading and proving them on the plaintiff. The true test as to whether a condition is genuinely precedent or subsequent is: Does the liability of the defendant arise before or after performance of the condition? If the former, it is a condition subsequent; if the latter, it is a condition precedent. The practical significance of the distinction is well shown in an able dissenting opinion by Mr. Justice Doe in *Kendall v. Brownson* (1869) 47 N. H. 186, 196. If the burden of proof is on the defendant, then in a case where the evidence is in equilibrium the defendant loses. The courts by mistaking a condition precedent for a condition subsequent may, under the existing rules of pleading, cause a defendant to lose a decision which he should justly win.

C. M.

CONTRACTS—EXCUSE FOR NON-PERFORMANCE—WAR AS CONTINGENCY BEYOND PROMISSOR'S CONTROL.—DUCAS V. BAYER CO. (1917) 163 N. Y. S. 32.—In June, 1914, the defendant agreed in writing to deliver to the plaintiff a certain amount of dyestuffs, stipulating that it should not be held accountable for delays due to contingencies beyond its control. After the outbreak of the war which finally cut off the supply, it had on hand, or received, more than enough goods to fully perform all written contracts. Instead of filling these it made a ratable distribution of the goods among all its regular customers. *Held,* that the contingency which actually caused the non-performance of the contract was not an inadequate supply of goods, but the *pro rata* distribution of such goods as defendant had.

The present war was held to be no excuse for the failure of a German firm to deliver to an American firm Belgian antimony according to agreement. *Richards & Co. v. Wreschner* (1915) 156 N. Y. S. 1054;

aff'd. 158 N. Y. S. 1129. Difficulty of performance, even though unforeseen, will not excuse a breach of contract; it must be shown that the undertaking cannot in any way legally be performed. *U. S. v. Gleason* (1900) 175 U. S. 588; *Lima Locomotive & Machine Co. v. National Steel Castings Co.* (1907) 155 Fed. 77; *Rowe v. Peabody* (1911) 207 Mass. 226. This is true even though the difficulty is due to war. *Smith v. Morse* (1868) 20 La. Ann. 220; *Elsey v. Stamps* (1882) 10 Lea (Tenn.) 709; *Jacobs v. Crédit Lyonnais* (1884) 12 Q. B. D. 589; *Ashmore v. Cox* [1899] 1 Q. B. D. 436. In the coke and coal business custom seems to have made a shortage of supplies or shipping facilities an excuse for non-performance on the part of the seller, provided he delivers a proportional amount to each of the buyers. *Oakman v. Boyce* (1868) 100 Mass. 477; *McKeefrey v. Connellsville Coke Co.* (1893) 58 Fed. 212; *Luhrig Coal Co. v. Jones & Adams Co.* (1905) 141 Fed. 617. But there must be no sales to new customers during the period of scarcity. *Jessup & Moore Paper Co. v. Piper* (1902) 133 Fed. 108; *Metropolitan Coal Co. v. Billings* (1909) 202 Mass. 457 (dicta in both instances). Even if the coal dealer has on hand a sufficient supply to fill his contract with the buyer, he is not bound in times of shortage to deliver to the buyer the whole amount of his order to the exclusion of other customers. *Garfield & Procter Coal Co. v. Penn. Coal & Coke Co.* (1908) 199 Mass. 22; *Metropolitan Coal Co. v. Billings, supra.* More in accord with the principal case, it has been held that the fact that a seller cannot supply all his customers at the same time will not excuse a breach of contract with any one of them. *Emack v. Hughes* (1902) 74 Vt. 382; *Seligman v. Beecher* (1908) 36 Pa. Sup. Ct. 475.

G. E. W.

CONTRACTS—OFFER—ACCEPTANCE AFTER REASONABLE TIME.—NATIONAL WATCH CO. v. WEISS (1917) 163 N. Y. S. 46.—The defendant, an attorney, offered by mail to assure payment of a judgment which the plaintiff had obtained against his client, if the plaintiff would extend the time of payment sixty days. An acceptance was sent after a reasonable time had elapsed. There was no reply by the defendant. The judgment was not paid. *Held,* that the failure by the defendant to reply indicated acquiescence and that, after the return of the execution against the client unsatisfied, the defendant was liable.

If the contract were unilateral the act of forbearance by the plaintiff would be considered adequate acceptance. *Strong v. Sheffield* (1895) 144 N. Y. 394. Yet the court construed the contract to be bilateral. The weight of authority in this country seems to be that a contract completed by acceptance after a reasonable time is void. *Ferrier v. Storer* (1884) 63 Ia. 484, 487; *Maclay v. Harvey* (1878) 90 Ill. 525; *Larmon v. Jordan* (1870) 56 Ill. 204. Yet the modern tendency appears to be that if the acceptance is made after a reasonable time has elapsed, the offeror must immediately, upon receipt of the letter of acceptance, notify the offeree that the offer was withdrawn in order not to be bound. *Phillips v. Moor* (1880) 71 Me. 78; *Morrell v. Studd* [1913] 2 Ch. 648; Pollock (1914) 30 LAW QUART. REV. 4; German Civil Code, sec. 149; Japanese Civil Code, art. 522; Swiss Code of Obligations, sec. 5.

F. C. H.